

## Attorney General Opinions

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To: J.D. Williams

From: David High

Keywords: Department of Labor, Sick and Vacation Leave

Date: April 8, 1999

Issue: Whether or not the request made by the Department of Labor for reinstatement of sick and vacation leave would create bad precedent or administrative problems.

Opinion: The Office of the Attorney General held that because it would not create administration problems or set a bad precedent the Board of Examiners could exercise its discretion to approve this request.

Reasoning: In so far as administrative problems, he determined that their request would be easier than trying to recalculate the balances retroactively since these balances generate other incidental changes. With regards to bad precedent, he felt that the request could be granted based on the extreme nature of the hardship to the employees.

Supplemental Information:

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To: J.D. Williams

From: David High

Keywords: State Insurance Fund, Comp Time, Administrative, Professional, and Administrative Employees, and Board of Examiners

Date: August 6, 1998

Issue: Whether or not the State Insurance Fund, as an independent, body corporate and politic, is required to obtain State Board of Examiners' authorization for payment of comp time for executive, professional, or administrative employees.

Opinion: In 1998, the legislature allowed the State Insurance Fund to become an independent entity. Because of this they now have the ability, on their own, to decide employee compensation without authorization from the Board of Examiners. For the employees, who had comp time prior to this legislation, they will still be compensated if the Board of Examiners had already approved it.

Reasoning: In Idaho Code 59-1607(4) and 67-5329(2), it states that both classified and non-classified employees, who are designated as executive, professional, or administrative, are required to obtain permission from the Board of Examiners for comp time pay. However, in 1998 the state legislature passed into law section 72-901, which allowed the State Insurance Fund to become an independent entity. He states that the intent of this legislation was to hold previously accrued comp time harmless. Thus, if prior to this legislation the Board of Examiners had approved comp time, it still would remain in effect. However, if the time were accrued after the legislation, the State Insurance Fund would not need the permission of the Board.

Applicable Statutes: 59-1607(4), 67-5302, 67-5329(2), 72-906

Supplemental Information:

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To: Chuck Severn

From: Dave High

Keywords: Moving Expenses, Advances, and New Hire Employees

Date: February 11, 1998

Issue: Whether or not moving expenses may be paid in advance to a new hire.

Opinion: The Office of the Attorney General stated that advance payments for moving expenses are not authorized because there is a potential for the advance payment to be more than necessary.

Reasoning: He states that in Idaho Code Chapter 20, Title 67, there are general provisions for compensation that is incurred by state employees. Throughout the section compensation is reserved for services that "were actually rendered."

Thus, there is nothing in the statute that contemplates advance payments.

Furthermore, he states that the Board of Examiners has adopted regulations for moving expenses. These expenses are not to exceed the "actual expense."

Thus, there is a potential for over compensation if the payments were to be made in advance.

Applicable Statutes: Idaho Code 67-2006, 67-2011, 67-2022, 67-2020, and 67-2019

Supplemental Information:

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To: Peggy Haar

From: Rinda Just

Keywords: Travel Time, FLSA, Compensable Time

Date: December 5, 1997

Issue: What compensation should be given to an FLSA covered employee when he/she is required to work outside the city.

Opinion: For the first type of assignment, which is all in the same day travel (29 C.F.R. 785.37), the time between the employees' departure until the employees' return, less any meal breaks, is considered compensable time. In regards to the other type of travel, out-of-town overnight (29 C.F.R. 785.39), only travel time during the employee's normal working hours (whether on a workday or non-workday) is compensable.

Reasoning: For the first type of travel, even if the employee only performs meaningful work part of the day, because the time spent traveling was for the "employers' benefit" and at its request and is part of the "principle activity" of the employer, the time between departure and return, less meal breaks, is compensable.

For the second type of travel, the employee is entitled to all normal working hours regardless of whether any meaningful work had been done, except for meal and home-to-work commute. While travel time is compensable outside working hours in the first instance, it is non-compensable when the employee is a passenger in a public or private conveyance. However, with that said, if the employee performs meaningful work while traveling or drives him or herself, that time is compensable.

Applicable Statutes: 29 C.F.R. Section 785.38, 785.39, 785.40, 785.41

Supplemental Information:

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To: J.D. Williams

From: Matthew McKeown

Keywords: Idaho State Travel Policy, Third Party Reimbursement, and Written Verification

Date: September 10, 1996

Issue: First, whether or not claims to be reimbursed by a third party are subject to the limitations of the Idaho State Travel Policy, or are they controlled by the agreement for reimbursement between the employee and the third party. Second, if the reimbursement falls under the preview of the employee and the third party, should written verification regarding the agreement be furnished by the employee or from the third party.

Opinion: The Office of the Attorney General stated that third party reimbursement claims should be controlled by the reimbursement agreement between the employee and the third party. As such, written verification should come directly from the third party.

Reasoning: He cites the Idaho State Travel Policy's specific notation concerning the reimbursement of State employees by third parties. It states that there is not a limit to the amount that a third party may provide to the state, thus third party reimbursements should be controlled by the agreement between the employee and the third party. Because of this policy, the employee must notify the department regarding a third party reimbursement. In addition, the employee must also fill out the name and the billing address of the third party. Consequently, because it is a promise by the third party to reimburse the state, written verification must come from the third party.

Applicable Statutes: Idaho State Travel Policy

Supplemental Information:

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To: J.D. Williams

From: Thomas F. Gratton

Keywords: Classified and Non-classified employees, Vacation Time Transfer, Retirement

Date: August 2, 1995

Issue: First, whether or not non-classified employees can be paid their vacation balances upon transfer to another state agency. Second, whether or not employees, who are rehired after retirement, are eligible to use excess sick leave accrued from prior state employment.

Opinion: The Office of the Attorney General felt that non-classified employees are not entitled to be paid their vacation balances upon transfer to another agency because compensation for unused time can only be awarded at separation from state employment pursuant to 67-5335. On the second issue, the employee is entitled to sick leave that was accrued upon separation from state employment if they return within three years. For retirement purposes, they are still entitled to it, but the amount is lessened because half of the unused time was transferred to the employee's retirement account upon retiring.

Reasoning: Pursuant to Section 59-1603, vacation time is treated the same for classified and non-classified employees. That being said, 67-5335 states that, "Vacation leave not taken shall be compensated for at the time of separation only." Regarding the second issue, he cites 67-5339, which states that an employee is entitled to sick leave if they return to state employment within three years. He states that 67-5339 also provides that at the time of retirement, one-half of an employee's unused sick leave must be transferred to the employee's retirement account. Thus, if the employee comes back to employment within three years, half of the sick leave will be credited to the employee.

Applicable Statutes: Idaho Code 59-1603, 59-1606, 67-5335, 67-5337, 67-5333, and 67-5339

Supplemental Information:

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To: J.D. Williams

From: John McMahon

Keywords: State Auditor, Prices for Disclosure of information, Public Records

Date: June 25, 1993

Issue: What the State Auditor may charge the public when information is requested that demands considerable time and expenses by staff.

Opinion: The Office of Attorney General held that in normal cases only the "actual cost" of producing the document may be assessed because the taxpayers have already provided for the document. However, with a more difficult request it may be possible to include labor costs to the fee. Thus, the Attorney General's Office concluded that the State Auditor would have to use careful discretion in this matter.

Reasoning: This question was brought forth because a reporter asked for information pertaining to the amount of bonuses paid to state employees for FY 91, 92. The information for FY 92 was readily available for a nominal price because this information was already generated for the legislature. However, in the case of FY 91, the information would be much more costly because it would require extensive computer processing. The total charges of producing the document came to \$3,015.00. The reporter challenged this price stating that this price was unfair, and that it is illegal for the Auditor to charge a fee that includes the cost of labor to produce the information.

The Office of the Attorney General stated that as far as the fairness of pricing goes, the office has no way of determining the fairness of the fee. However, he states that pursuant to Idaho Code 9-338 (1), the legislature intended to make it easy for a person to examine any public record. That being said, any public agency, pursuant to 9-338 (8) has the ability to establish a copying fee schedule. However, this fee may only be for the "actual cost" of copying the record. This would make it illegal to charge administrative or labor costs resulting from locating and providing a copy of the public record.

Despite this holding, the issue of whether computer-processing costs fall under the purview of "labor costs," is a much more complicated issue. The Public Record Law did intend for easy access, but with a more difficult request, labor costs may be assessed if the task cannot be accomplished within "regular working hours." That is, the taxpayer has already provided for examination of the records, but if the request is so massive, then additional costs may be included to the fee. Ultimately, the Office of the Attorney General left it to the careful discretion of the State Auditor.

Applicable Statutes: Idaho Code 9-338(1), 9-338 (8), 9-338 (7)

Supplemental Information:

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To: J.D. Williams

From: Barbara J. Reisner

Keywords: Taxability of Reimbursements, Business and Personal Expenses, Department of Law Enforcement, and Three Tests of an "Accountable Plan."

Date: November 6, 1990

Issue: Whether or not State Troopers can deduct meal expenses as business expenses pursuant to section 162.

Opinion: The Deputy Attorney General felt that the state troopers can deduct meal expenses as business expenses, and are therefore not subject to taxation pursuant to section 162.

Reasoning: The Office of the Attorney General felt that the restrictions that are placed on State Troopers closely resemble the situation of the Minnesota State Troopers in the *Christey* case, and therefore constitute a business expense pursuant to section 162. In addition, in order for the business expenses to be excludable, an "accountable plan," which includes business connection, substantiation, and returning amounts in excess of expenses are all necessary requirements. She felt that all three of these requirements have been met, and thus the meal reimbursement for the troopers should be excludable.

Applicable Statutes: 26 C.F.R. Section 1.62-2T (1990), 26 U.S.C. Section 162 and 62 (a)(2)(A),

Applicable Case Law: *Christey v. U.S.*, 841 F. 2d 809, 811 (8<sup>th</sup> Cir. 1988), *Moscini v. Commissioner*, 36 TCM 1002 (1977-245), and *Pollei v. Commissioner*, 887 F.2d 838 (10<sup>th</sup> Cir. 1989).

Supplemental Information:

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To: J.D. Williams

From: David High

Keywords: Termination pay, Department of Labor, Wage payment Statute, and Exemption

Date: July 11, 1989

Issue: Whether or not the provisions of chapter 6, title 45, Idaho Code, dealing with the time for payment of wages, apply to the state.

Opinion: The Office of the Attorney General felt that 45-606 did not apply to the state because the exemption could be filed.

Reasoning: In this section, the code specifies that payment of wages be made within ten days of the end of the pay period. The Deputy Attorney General cited section 59-503 (2), which states that the state auditor from and after June 30, 1973 may prescribe pay periods different from a monthly pay period. Thus, state employees on a bi-weekly payroll must be paid on or before two weeks from the end of the pay period for which salaries are due. Because this section is specific to the State of Idaho it should trump over the general payment provisions of Section 45-606.

Applicable Statutes: 45-608, 45-606, 59-503, and 45-601.

Supplemental Information: The definition of an "employer" pursuant to section 45-601 of the Idaho Code does not apply to the State of Idaho.

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To: J.D. Williams

From: David High

Keywords: Classified and Non-classified employees, Bonus limitations

Date: July 10, 1989

Issue: Whether or not the employee bonus limitation of Idaho Code 67-5309C applies to non-classified employees.

Opinion: The Office of the Attorney General felt that 67-5309C did not apply to non-classified employees because the section on its own terms specifically applies to classified employees only.

Reasoning: He cites Idaho Code Section 67-5309C © (iii), which states that the \$1,000 limitation only applies to classified employees. Consequently, neither Idaho Code Section 67-5309 nor chapter 16, title 59, Idaho Code limit bonuses to \$1,000 for non-classified employees.

Applicable Statutes: 67-5309C, 67-5309C © (iii), 59-1603, and 7-5309C © (iii)

Supplemental Information:

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To: Joe R. Williams

From: Jim Jones

Keywords: Executive Branch, Elected Officials, Vacation Time, Compensation, and Non-classified employees

Date: **Opinion 86-15**

Issue: Whether or not elected officials of the executive branch of state government are entitled to receive cash compensation for unused vacation leave upon leaving office at the end of their term.

Opinion: The Attorney General held that they were not entitled to this cash compensation because elected officers receive a fixed salary for a fixed term of office. Thus, their right to compensation is not affected by sickness or vacation. It is strictly a right incident to their holding office.

Reasoning: The Attorney General began his analysis by stating that pursuant to Idaho Code 67-5334 and 67-5335, state employees and “eligible” state officers are entitled to be paid their salary for the period of their unused vacation leave upon leaving state employment. However, this does not apply to the state’s elected executive offices. The reason being that in the Idaho Constitution Article 4, section 19 states those elected officers in the executive branch shall be in full for all service rendered in any official capacity during their terms of office. Thus, they cannot be paid more than their per annum salary pursuant to Idaho Code 59-501. Additionally, the Idaho Supreme Court held in *Buckalew v. City of Grangeville*, 100 Idaho 460, 600 p. 2d 136 (1979) that salary is incident to the office, which makes their salary fixed for a fixed amount of time.

Applicable Statutes: Idaho Constitution Art. 4, Sect. 19, Art. 3, Sect. 23; Idaho Code Sections: 59-501, 59-1606, 67-5334, 67-5335, and 67-5337.

Applicable Case Law: *State ex rel. Wright v. Gossett*, 62 Idaho 521, 113 P.2d 415 (1941), and *Buckalew v. City of Grangeville*, 100 Idaho 460, 600 P. 2d 136 (1979).

Supplemental Information:

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To: Joe R. Williams

From: David High

Keywords: Credited State Service, Overtime Pay

Date: November 2, 1988

Issue: Whether or not credited state service for overtime work should be calculated on the basis of time worked, or on the basis of the time and one-half pay rate.

Opinion: He states that in order to calculate credited state service, the accrual of hours shall be calculated on the basis of time and one-half for overtime hours. Additionally, an employee should not receive credited state service for a payoff of vacation leave.

Reasoning: In 1988, the legislature modified 67-5332 to change the formula by which credited state service is calculated. This resulted in a change of credited hours from the hours that an employee is present for duty, to the hours for which employees receive pay. The Office of the Attorney General interpreted that change to mean that overtime hours would be calculated on the basis of time and one-half. Thus, if an employee works eight hours of overtime, he is credited with twelve hours of state service.

Applicable Statutes: Idaho Code 67-5332

Supplemental Information:

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To: Martin Peterson (Administrator Financial Management)

From: Steven Addington

Keywords: Outfitters and Guides Board, Compensation, Actual Performance of Duty

Date: July 2, 1986

Issue: Whether or not Idaho Code 59-509 limited the compensation of board members to only those days when the board actually meets. If the answer is "no," should the per diem rates set out in 59-909 be converted to hourly rates based on an eight-hour workday.

Opinion: The Office of the Attorney General felt that 59-909 did not specifically limit compensation to only those days the board or commission meets. Since this is the case, the office thought that it would best serve the legislative intent of the statute to convert compensation to an hourly rate when an individual member of the board acts in its behalf.

Reasoning: He cited the Idaho State Supreme Court case *Rankin v. Jauman*, which construed narrowly, albeit a repealed statute, the compensation for county commissioners. The court felt that compensation could only be acquired when the board actually met. However, he stated that this is a repealed statute, and that the language between this repealed statute and the 59-909 is different. Idaho Code Section 59-509 states compensation should only be given for the "actual performance of duties." Thus, the deputy attorney general felt that compensation could be given without the board actually meeting, but that an individual member must get specific authorization from the commission to act in its behalf.

In regards to the second issue, when an individual member performs actual duties while the board is not in session, the compensation for those actual hours should be converted to an hourly rate. In order to accomplish this, he cited a Wisconsin Court case, which stated that an arbitrary number of hours must be set in order to establish a workday. Consequently, since state employees work an eight-hour day, this number would be the most logical.

Applicable Statutes: Idaho Code 59-509, 36-2107

Applicable Case Law: *Rankin v. Jauman*, 4 Idaho 394; *Miller v. Smith*, 7 Idaho 204; *Robinson v. Huffaker*, 23 Idaho 173; *Hoffman v. Lincoln County*, 118 N.W.Rept. 850 (Wis. 1908); *Mansel v. Nicely*, 34 A. 793 (Penn. 1896).

Supplemental Information:



To: Joe R. Williams

From: David High

Keywords: Social Security Withholding, University of Idaho, Fees, Athletics, Employees, Officials, Kootenai County, County Prosecutor

Date: April 15, 1983

- Issue: 1.) Whether or not the University of Idaho should withhold FICA from the stipend that the teachers receive for teaching classes.
- 2.) Whether or not the University of Idaho should withhold FICA from the compensation received by game officials, who officiate at University athletic competitions.
- 3.) Whether or not Kootenai County should withhold FICA from the compensation the received by the Public County Defender.

Opinion: The Office of the Attorney General felt that in all three cases, the public entity should not withhold FICA because all three are not employees. Additionally, in all three cases the individual is paid on a fee basis.

Reasoning: In the opening, he tried to differentiate between "wages" and "fees." The difference lies in whether the person is compensated for the job or particular service, or is compensated by the amount of time spent working (hours, weeks, months). In the case of the "affiliated faculty" in Idaho Falls, he felt that the teachers are paid on a fee basis because they are paid \$1,000 per specific course taught. Thus, the University of Idaho is not required to withhold FICA from their stipends. For the game officials, he also felt that the University is also not required to withhold because the officials are contracted through the Conference, and are thus not an employee of the University. In addition, they too are also paid for a specific job rather than by wages. In the last ruling, the County Public Defender is not an employee of Kootenai County because the law does not mandate his position. Thus, the County is not required to withhold FICA because he is paid on a fee basis because his compensation is not contingent on the amount of time devoted to his job.

Applicable Statutes: Rev. Rul. 70-308, 70-363, 71-291, 57-119, 67-110

Applicable Case Law: *Crawford v. Bradford*, 2 So. 782, 23 Fla. 404; *San Diego County v. County*, 195 A. 118, 328 Pa. 3; *In Re Stryker*, 53 N.E. 525, 158 N.Y. 526; *Cochran v. A.S. Baker Co.*, 61 NYS 724.

Supplemental Information:

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To: Joe R. Williams

From: John Sutton

Keywords: Honorarium, Retirement Board, Elected Officials Pay,

Date: June 9, 1981

Issue: Whether or not Article 4 Section 19 and the changes made to Idaho Code Section 59-1326 would exclude elected officials from receiving an honorarium as a member of the Retirement Board.

Opinion: The Office of the Attorney General felt that the Constitution and this Code section did not exclude elected officials from collecting their honorariums because an honorarium is something other than compensation or salary for services rendered.

Reasoning: He states that only if the honorarium was additional salary or compensation would it create a problem. However, the legislative intent is the key for statutory construction. He felt that the legislature had no clear intention of making the honorarium a salary or a wage. The main issue is the phrase "compensated" in 59-1326(4). He states that compensated means a transmission of that which is received rather than a categorical description of remuneration. The honorarium is a voluntary reward, which has no connection with the office held, and does not constitute "compensation." Thus, elected officials may legally receive honorarium as a member of the retirement board.

Applicable Statutes: I.C. 59-1326, Idaho Constitution Art.4 Sec.19, 59-509, 67-2008

Applicable Case Law: *Northern Pacific Railway Co. v. Shoshone County*, 63 Ida. 36; *Cunningham v. Commr. of IRS*, 67 F.2d. 205; *Converse v. U.S.*, 21 HOW U.S. 463; *Sullivan County v. Spencer*, 369 Mo. 97

Supplemental Information:

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To: Chester Graham

From: John Sutton

Keywords: State Auditor, Social Security Withholdings

Date: March 5, 1981

Issue: Whether or not I.C. 59-1105 authorizes the State Auditor to collect social security contributions from state agencies in the same manner as prescribed in that code section.

Opinion: He felt that the State Auditor did not have the ability to collect Social Security contributions from state agencies pursuant to that code section.

Reasoning: He states that I.C. 59-1105 applies to local entities exclusively. Thus, I.C. 59-1105 would not apply to entities such as the State Auditor.

Applicable Statutes: Idaho Code 59-1105,

Supplemental Information:

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To: Bruce Balderson

From: Larry Harvey

Keywords: Social Security Act, Sick and Disability Exclusion, Board of Examiners

Date: **Opinion 80-28**

Issue: Whether or not the State of Idaho's statutory and regulatory structure can provide for excluding from wages the payments to employees made on account of sickness or disability.

Opinion: The Office of the Attorney General explained that there are already in place statutes and regulations of the state that take into consideration the exclusion of sick or disability payments. Furthermore, he stated that the regulatory aspect could be resolved in a few steps. Thus, the exclusion could be implemented without too much difficulty.

Reasoning: Idaho Code sections 59-1605 and 67-5333 provides for the accrual and use of sick leave for the state's classified and non-classified workforce. These statutes provide the legal framework for the sick or disability exclusion. Pursuant to these statutes, payments made to employees for "actual sickness or disability" would be excluded from being considered wages. However, in the case that the state permits the use of sick leave when the employee is not sick, and vacation time could be used instead, these payments would not be excluded.

In order to implement this exclusion, the Board of Examiners would need to set a policy for the implementation and regulation of this exclusion. In addition, a uniform time and leave keeping system for all employees, as well as an order from the State Auditor ordering the implementation of this system.

Applicable Statutes: I.C. 67-5333, 59-1605, 67-5338

Supplemental Information:

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To: Joe Williams

From: Larry Harvey

Keywords: Encumbrances, Payment, Fiscal Year

Date: June 29, 1979

Issue: Whether or not the appropriation of a current fiscal year can be encumbered for the purpose of paying the salary or wages of a state employee in the following fiscal year.

Opinion: The Office of the Attorney General felt that section 67-5321(2) did not allow encumbering for the purpose of paying salary or wages of a state employee in the following fiscal year.

Reasoning: This statute only allows for the payment for specific products or services within the fiscal year accrued. Thus, the payment of wages must be made no later than the end of the fiscal year.

Applicable Statutes: I.C. 67-3521(2)

Supplemental Information:

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To: Wayne Kidwell (A.G.)

From: David High

Keywords: Overtime Pay, Computer Programmers, Unusual or Emergency Circumstances

Date: May 23, 1978

Issue: Whether or not the certain Tax Commission computer programmers and their supervisor could be paid overtime compensation for large amounts of overtime work which were necessary in establishing a system for processing tax returns.

Opinion: He felt that under the circumstances, the Board of Examiners could construe the situation as an "unusual" one, and thus could award the overtime pay if they saw fit.

Reasoning: He cites Idaho Code 67-5329(2), which states that an employee classified as executive, administrative, or professional is only eligible for cash compensation for overtime when the Board of Examiners construes the overtime as an "unusual or emergency situation." These employees were classified as "professional," and are therefore subject to the determination of the Board. He felt that this situation could be considered an "unusual" circumstance because the overtime did not result from normal day to day operations.

Applicable Statutes: I.C. 67-5329(2), 67-5302(23)

Supplemental Information:

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To: B.R. Brown

From: Thomas Swinehart

Keywords: Salary Advances, State Employees

Date: May 9, 1978

Issue: Whether or not a state employee can receive a salary advance or draw on pay already earned prior to the regular payday. Additionally, whether or not a state employee receive a salary advance on pay that has yet to be earned.

Opinion: The Office of the Attorney General stated that an employee may not receive a draw against salary already earned in advance of the regular payday. This also applies for salary not yet earned.

Reasoning: He cites Idaho Code 67-2012, which states that employees of the state must be paid at regular periodic intervals set by law. This section allows for no salary advances for salary already earned. As for the question of a draw on salary not yet earned, this same section requires a certification from the department head that the services were actually rendered as charged. Thus, salary advances may not be issued to state employees.

Applicable Statutes: I.C. 59-503(1), (2); 67-2012; 67-2020

Supplemental Information:

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To: Eric Oden

From: Warren Felton

Keywords: Charitable Campaigns, Employee Pay

Date: October 13, 1976

Issue: Whether or not an employee, who is loaned to the United Way for charitable campaigns, could still continue to receive State payment.

Opinion: The Office of the Attorney General felt that this practice of loaning a state employee to the private sector and receiving State payment for the time worked, regardless of whether it is charitable or not, is forbidden by law.

Reasoning: In Idaho Code 59-511 it states that the employee shall hold no other office of profit, unless it is for the public good and approved by the employing director. Furthermore, 59-512 states that an employee may not receive state payment for any extra service in the ordinary course of employment. Thus, he felt that an employee could still donate their time, but they must use their leave time, take time without pay, or volunteer on their own time, so long as they are not being paid for actual time that they did not work.

Applicable Statutes: I.C. 59-511, 59-512, 18-5701

Applicable Case Law: *Veterans of Foreign Wars of the United States, Dept. of Oklahoma v. Childers*, 197 Okla. 331; *Citizens Savings & Loan Ass'n v. Topeka*, 87 U.S. 655

Applicable Information:

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